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Supreme Court of the United States

OCTOBER TERM 1958

No. 642

ELEANORE M. LOEB,

Petitioner,

against

WILLIAM LOEB,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Statement

This brief is filed in reply to the Brief For Respondent In Opposition To Petition For Writ Of Certiorari under the provisions of Rule 24, sub-Section 4 of the revised Rules of this Court. The cases and statutes herein cited are all among those indexed in said Brief for Respondent.

Reply to Respondent's Point I

Respondent attacks petitioner's reliance upon the Privileges and Immunities Clause of Article IV, Sec. 2 of the Constitution with the assertion that said Clause "does no more than prevent a state from discriminating against citizens of other states in favor of its own." That conclusion is not completely warranted by the case cited (*Hague* v. *C. I. O.*, 307 U. S. 496, 511) but the point need not be pressed here, because the Fourteenth Amendment

certainly prevents a state from denying constitutional rights to all citizens, its own as well as those of other states.

Respondent then shifts consideration to residence, and cites *Douglas* v. *N. Y., N. H. & Hartford R. R. Co.*, 279 U. S. 377, 387 for the proposition that there may be "a distinction of privileges according to residence" if based upon "rational considerations". Mr. Justice Holmes, writing for the Court, stated in *Douglas* that in some instances "there are manifest reasons for preferring residents in access to often over-crowded Courts, both in convenience and in the fact that broadly speaking, it is they who pay for maintaining the Courts concerned." Respondent endeavors to conclude, obviously indulging a *non-sequitur*, that there are manifest reasons for preferring New York wives in granting what he terms the "unusual relief contemplated by Sec. 1170-b." Preferring them, we inquire, to whom? Not surely to New York residents. If *Douglas* has any application, it favors plaintiff-petitioner. She sued as a New York resident.

To petitioner's reliance on the Equal Protection Clause of the Fourteenth Amendment, respondent asserts (Brief, p. 6) that "the Fourteenth Amendment requires only that there be some rational basis for any classification created by State Statute," and cites this Court's pronouncement (*N. Y. Rapid Transit Corporation* v. *City of New York*, 303 U. S., 573, 578) that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it." The full proposition was contained in a preceding sentence to the effect that no question could be raised of the right of a state to enact laws "based on a reasonable classification of the objects of the legislation or of the persons whom it affects" (p. 578).

This is established and sound law, but has no application to the case at bar, for we are not here considering

any classification created by statute. The New York Legislature in enacting Sec. 1170-b of the Civil Practice Act, neither limited or sought to limit the relief afforded to any class, but made it open to all women who could maintain an action for separation, divorce or annulment. Had the Legislature limited the relief to "New York wives", we would be faced with the question of the reasonableness of the classification as discussed in *New York Rapid Transit*. Not only did the New York Legislature not attempt any such classification, but it rejected an early draft of Section 1170-b which specifically limited the relief to a wife whose "last joint matrimonial domicile (with her husband) is or was within the State" (see Supplemental Affidavit of Alexander C. Dick in support of motion for reargument to the Court of Appeals, p. 2).

In short, the classification of "New York wives" was judicially created out of whole cloth, with not a word or phrase in the Statute enacted to suggest it or support it. Respondent dodges that fact and cites no authority,—and none exists, we believe,—for saying that a court can create a classification with resultant discrimination where the Legislature indicated no intention of doing so.

Reply to Respondent's Point II

Respondent's second and final Point ascribed to petitioner the theory that "the so-called divisible divorce doctrine imposes a constitutional obligation upon the State of New York to award alimony to petitioner and all former other wives whose husbands obtain valid *ex-parte* divorces and who thereafter settle in New York" (Brief, p. 7).

Petitioner advances no such theory. Petitioner does not claim that the divisible divorce doctrine created by this Court imposes a constitutional obligation upon the State of New York to award alimony to anyone. The Legislature of the State of New York of its own free will

and accord, and on its own initiative, and in the untrammelled exercise of its own wisdom, enacted Sec. 1170-b to secure alimony to wives who had been abandoned and, under the divisible divorce doctrine, effectively divorced by their husbands. Petitioner maintains that it is the duty of the New York Court of Appeals to interpret and apply Sec. 1170-b to carry out, rather than to defeat, the purposes of this Court in establishing the divisible divorce doctrine.

Conclusion

We conclude and urge that, entirely apart from denial of petitioner's constitutional rights, a substantial federal question is presented. It is federal in an unusual but very real sense, since it was by virtue of the decision of this Court establishing the divisible divorce doctrine, and by virtue of that decision alone, that the Nevada divorce secured against petitioner had to be recognized as valid by her and by the state of her residence. (See Harlan, J. dissenting in *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 432-3.) Whenever the rights of a woman made "single and penniless" by that doctrine are involved the question is of sufficient substance to warrant full consideration by this Court.

Respectfully submitted,

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